

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

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| JORGE GOMEZ, |) | Case No.: 1:21-cv-00207-AWI-JLT (HC) |
| |) | |
| Petitioner, |) | FINDINGS AND RECOMMENDATION TO |
| |) | DISMISS PETITION WITHOUT PREJUDICE |
| v. |) | |
| |) | |
| ANDREW CIOLLI, Warden, U.S.P. Atwater, |) | [10-DAY OBJECTION DEADLINE] |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

Petitioner filed the instant petition for writ of habeas corpus on February 19, 2021. (Doc. 1.) After conducting a preliminary review of the petition, the Court found that the petition was unexhausted. (Doc. 4.) Accordingly, on March 11, 2021, the Court issued findings and recommendations to dismiss the petition for failure to exhaust administrative remedies. (Doc. 4.)

On April 2, 2021, Petitioner filed a motion to withdraw the petition. (Doc. 5.) Accordingly, the Court will construe Petitioner's motion as a request for voluntary dismissal. Respondent has not yet filed an answer to the petition.

Pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, "the [petitioner] may dismiss an action without a court order by filing: a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment" Pursuant to Rule 12 of the Rules Governing Section 2254 Cases, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these

1 rules.”

2 In this case, Respondent has not yet filed an answer or other responsive pleading. Therefore,
3 under Rule 41(a)(1), the petition must be dismissed without prejudice. The Court expresses no opinion
4 with respect to the timeliness of the instant petition or any future petition. Nevertheless, Petitioner is
5 advised that there is a one-year statute of limitations period governing the filing of federal habeas
6 petitions which commences upon the conclusion of direct review. 28 U.S.C. § 2244(d). The statute
7 may be tolled while Petitioner seeks relief in the state courts, see 28 U.S.C. § 2244(d)(2), but it is not
8 tolled for the time a habeas petition is pending in federal court. Duncan v. Walker, 533 U.S. 167, 181-
9 82 (2001).

10 **RECOMMENDATION**

11 For the foregoing reasons, the Court RECOMMENDS that the petition be dismissed without
12 prejudice.

13 This Findings and Recommendation is submitted to the United States District Court Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
15 Rules of Practice for the United States District Court, Eastern District of California. Within ten days
16 after being served with a copy of this Findings and Recommendation, Petitioner may file written
17 objections with the Court and serve a copy on all parties. Such a document should be captioned
18 “Objections to Magistrate Judge’s Findings and Recommendation.” The Court will then review the
19 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to
20 file objections within the specified time may waive the right to appeal the Order of the District Court.
21 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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23 IT IS SO ORDERED.

24 Dated: April 5, 2021

/s/ Jennifer L. Thurston
25 CHIEF UNITED STATES MAGISTRATE JUDGE
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